In the Matter of	:	
	:	
RONALD E. LEWIS,	:	
Claimant,	:	
	:	
v.	:	
	:	
BAY SHIPBUILDING COMPANY/	:	**CASE NO.: 1997-LHC-1373**
SENTRY INSURANCE COMPANY,	:	
Employer/ Insurance Carrier,	:	**OWCP NO.: 10-35496**
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	
	:	

James Courtney, III, Esq., Duluth, Minnesota
Holly Lutz, Esq., Wausau, Wisconsin
For the Claimant

Gregory Sujack, Esq., Garofalo, Schreiber & Hart, Chicago, Illinois
For the Employer/Carrier

BEFORE: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, ***et seq.*** (hereinafter, "the Act"), and the regulations issued thereunder. After due notice, a hearing was held in Green Bay Wisconsin, on June 10, 1998, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the applicable regulations.[1] The findings and conclusions which follow are based upon a complete review of the record in light of the submissions of the parties and the applicable statutory provisions, regulations, and pertinent precedent.

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[1] Claimant Ronald E. Lewis will be referred to as "Claimant," and Employer/Respondent Bay Ship Building Company and its Carrier, Sentry Insurance Company, will be referred to as "Employer" and "Carrier", respectively, or collectively as "Employer/Carrier." References to the Transcript of the June 10, 1998 hearing appear as "Tr." followed by the page number.

PROCEEDINGS AND THE RECORD

Prior to the hearing, on May 29, 1998, Employer had filed a Motion for Leave for Post-Hearing Examination and for Leave to Submit Post-Hearing Evidence. In that Motion, Employer sought leave to obtain a post-hearing examination and report from Dr. Blasier (a physician who had examined the Claimant on behalf of the Employer in 1996), in view of evidence from Claimant's vocational expert, Mr. Ostwald, which was based in part upon an April 1998 examination report by Dr. Carlson. Employer's Motion was discussed in a telephone conference of June 5, 1998 and my preliminary ruling at that conference was to grant Employer's Motion but to allow the Claimant to combat any prejudice. However, at the hearing, Claimant's counsel readdressed the Motion and agreed "to delete anything subsequent to February of 1997 of the doctor" [Dr. Carlson] and counsel for the Employer agreed to withdraw his motion if the pertinent portions of the record were stricken. In accordance with the agreement of the parties, I ruled that Claimant's Exhibit ["CX"] 13 and certain pages of CX 1 (at O2, pp. 205-207) were stricken from the record. (Transcript of June 10, 1998 Hearing ["Tr."] 5-9, 177-179.)

At the hearing, Claimant's Exhibits 1 through 15 ("CX 1" through "CX 15"), Employer's (Respondent's) Exhibits 1 through 10 ("EX1" through "EX 10"), and Administrative Law Judge Exhibit 1 ("ALJ 1")(the Stipulation of the parties submitted under cover letter of May 21, 1998) were admitted into evidence, except for pages 205 through 207 of CX 1 [at O2] and all of CX 13, which were stricken, as discussed above. (Tr. 5-9, 10-11, 16-25, 159-65, 173-76, 177-79.) Testimony was given by Claimant Ronald E. Lewis (Tr. 31-81), his wife Christine Lewis (Tr. 81-116), Sheryl Langreder (Employer's occupational health nurse) (Tr. 118-128), John Schauske (Employer's production manager) (Tr. 129-169), and Sandra Paul (administrative assistant in Employer's human resources section) (Tr. 170-176).

Counsel for the Employer advised at the time of the hearing that Employer's vocational expert, Ms. Briggs, was unable to appear and he requested leave to take her deposition post-hearing. I ruled that the Employer would be able to submit the deposition post-hearing, but that the Employer would be responsible for any out-of-pocket expenses incurred by the Claimant, including expert witness fees (such as fees for attendance at the deposition and for a supplemental expert witness report), as a result of the post-hearing proceedings. The record was left open for Ms. Briggs' deposition to be submitted within thirty days, the Claimant would have thirty days to submit his vocational expert's deposition, the parties would then have thirty days to file proposed findings of fact and conclusions of law or briefs and any application for section 8(f) relief, the Director would have thirty days to respond, and the Employer would then have an opportunity to respond to any new Director's exhibits. (Tr. at pp. 11 to 15, 179-187). Following the hearing, Employer submitted the transcript of the June 29, 1998 deposition of Ms. Briggs and moved for it to be admitted as Employer's

Exhibit 11, and I stamp-granted the motion on July 20, 1998.

On August 11, 1998, the Claimant, through Mr. Courtney's associate, filed a Motion for Abeyance and Affidavit, asking for a stay of proceedings in view of the disappearance of Mr. Courtney and his paralegal while in his private plane on the way to an August 4 hearing. I stamp granted the Motion on August 17, 1998. By letter of August 14, received on August 18, counsel for the Employer stated no objection but asked that the stay be limited to two months.

On August 24, 1998, the Claimant, through Mr. Courtney's associate, filed the deposition transcripts of Claimant's vocational expert Mr. Ostwald taken on July 31, 1998 (subsequently admitted into evidence as CX 16) and of Claimant taken on July 31, 1998 (subsequently admitted into evidence as CX 17.)

On September 4, 1998, Employer filed a Motion to Terminate Abeyance and a Motion to Strike Certain Portions of the Deposition of David Ostwald with Alternative Motion for Post-Hearing Evidence [hereafter "Motion to Strike."] In the Motion to Terminate Abeyance, Employer advised of Mr. Courtney's death in an airplane crash and the discovery of his body on August 27, 1998 and asked that the Claimant be provided 30 to 45 days to seek substitute counsel and thereafter that the stay be lifted. In the Motion to Strike, Employer noted that Claimant's vocational expert had relied upon information concerning the Claimant's condition that was based upon testing administered to the Claimant subsequent to Ms. Briggs' deposition and asked that the portions of Mr. Ostwald's deposition related thereto as well as Deposition Exhibit 4, the report of William Reynolds, be stricken from the record. Alternatively, Employer asked leave to obtain and present post-hearing evidence.

Attorney Holly Lutz entered her appearance on behalf of the Claimant by letter of October 15, 1998.

In my Order of November 2, 1998, I ordered the Claimant to respond to Employer's Motion to Strike or, in the alternative, I ordered the parties to reach an agreement or stipulation as to what evidence should be stricken from the record and/or what additional evidence may be submitted by the parties (hereafter "Stipulation"). In my November 2, 1998 Order, I also provided that the record would close as of the date of the filing of the Stipulation (or the filing of the evidence agreed upon, if the parties stipulate that additional evidence may be filed), except to the extent that the Director may seek to submit evidence on the section 8(f) issue. The parties chose to file a Stipulation which was filed with the undersigned administrative law judge under cover letter of December 21, 1998 (marked as Administrative Law Judge Exhibit 2). The Director was not a party.

I approved the Stipulation by my Order of January 5, 1999. In the initial portion

of the Stipulation, the parties agreed to strike from the record any reference to changes in the Claimant's physical condition after April 1998 except for certain of Mr. Ostwald's findings, while the end portion of the Stipulation (incorporating a draft order) referred to striking references after June 1998. I adopted the April 1998 date in my Order, as striking references after April 1998 would also result in those after June 1998 being stricken. Thereafter, Claimant's counsel advised that she would not depose Ms. Briggs (in January 18,1999 correspondence).

By Order of March 22, 1999, I admitted into evidence Administrative Law Judge Exhibit 2 (the December 1998 Stipulation), Employer's Exhibit 12 (Ms. Briggs' supplemental report),[2] and Claimant's Exhibit 18 (Mr. Ostwald's supplemental report). I ordered that the parties submit any briefing and/or request for section 8(f) relief by April 30, 1999, and that the Director submit any response by June 1, 1999. Claimant's Post-Hearing Memorandum was submitted under letter of April 29, 1999 (received on April 30, 1999), and Employer's Post-Hearing Brief and Amended Application for Limitation of Liability under Section 8(f) of the Longshore and Harbor Workers' Compensation Act were submitted under separate letters of April 30, 1999 (received on May 3, 1999). The Director has not filed a response to the section 8(f) petition.

The record now consists of the following: Administrative Law Judge Exhibit ("ALJ") 1, Claimant's Exhibits ("CX") 1 through 15, and Employer's Exhibits ("EX") 1 through 10, which were admitted into evidence at the hearing in this matter, except for pages 205 through 207 of CX 1 [at O2] and all of CX 13, which were stricken. (Transcript of June 10, 1998 Hearing ["Tr."] at 5-9, 10-11, 16-25, 159-65, 173-76, 177-79.) In addition, the following documents were submitted following the hearing and have been admitted into evidence: the June 29, 1998 deposition of Ms. Diane Briggs, Employer's vocational expert (EX 11), admitted into evidence by my Summary Order of July 20, 1998; the July 31, 1998 depositions of Mr. David Ostwald (Claimant's vocational expert) and of Claimant, marked as CX 16 and CX 17, admitted into evidence by my Order Terminating Stay of Proceedings and Scheduling Briefing on Motion to Strike of November 2, 1998, with the exception of Deposition Exhibit 4 to CX 16, which was stricken; and the Stipulation of the parties submitted under cover letter of December 21, 1998 (ALJ 2), the December 14, 1998 supplemental report by Ms. Briggs (EX 12), and Mr. Ostwald's supplemental report (CX 18), which were admitted into evidence by my Order of March 22, 1999.

ISSUES

The following issues have been presented for resolution:

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[2] Employer identified this Exhibit as "Respondent's Exhibit 11" in its cover letter of January 28, 1999. However, as noted above, Ms. Briggs' deposition was admitted as Employer [Respondent]'s Exhibit 11, so the exhibit was remarked as "EX 12".

1. Temporary total/temporary partial disability

2. Date of Maximum Medical Improvement

3. Permanent partial disability under section 8(c)(21)

4. Section 8(f) relief

(ALJ 1). Entitlement to reimbursement for charges by Dr. W.B. Carlson is also at issue, based upon Employer's assertion that there was an unauthorized change of physicians.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STIPULATIONS

The parties (including the Director) entered into a Stipulation (ALJ 1), which incorporates the agreed upon facts set forth below:

1. The Claimant sustained an injury to his lower back on February 29, 1996, but it is disputed whether any disability resulted from the injury. (ALJ 1).

2. At the time of the injury, an employer-employee relationship existed between the Employer and the Claimant, and the injury arose in the course and scope of Claimant's employment with the Employer. (ALJ 1).

3. The Employer was notified of the injury on March 1, 1996 and a claim was filed on February 7, 1997, but no notice of controversion was filed and no informal conference was held. (ALJ 1).

4. Claimant's average weekly wage was $426.80.[3] (ALJ 1).

5. Medical benefits under section 7 of the Act were partially paid and compensation for temporary total disability (in the amount of $812.89) was paid for the periods and amounts set forth below:

From:	To:	Period:	Amount Paid:
3/13/96	3/15/96	3 days	$121.92
4/18/96	4/19/96	2 days	81.29
4/25/96	4/26/96	2 days	81.29

[3] The corresponding weekly compensation rate would be $284.53.

5/03/96	5/03/96	1 day	40.65
5/10/96	5/20/96	1 week, 4 days	447.09
5/29/96	5/29/96	1 day	40.65

(ALJ 1).

6. As of the time of the hearing, Claimant had not returned to full duty. (ALJ 1).

In addition, the Claimant and Employer agreed, in a second Stipulation, that references to changes in the Claimant's physical condition after April of 1998 would be stricken, except for Mr. Ostwald's findings based upon test results performed in June 1998. (ALJ 2). At the end of Claimant's case, to clarify a point raised, Mr. Courtney represented that "if the personnel of Courtney Law Office were called they would advise that the file open date 10/29/96 reflects the date the staff makes a file folder, not the date of first contact with our firm."[4] Mr. Courtney's representation to that effect as an officer of the court was accepted without objection. (Tr. 115-117).

FACTS

Background and Accident

Claimant, who was 55 years old at the time of the hearing, is a resident of Tipler, Wisconsin. (Tr. 32). His current home is on 12 acres and he grows tobacco, but he denies growing any income-producing crops or goods. (Tr. 35-36, 80). During his lifetime, Claimant has worked as a carpenter, a mill worker, a welder, a heavy equipment operator, a farmer, a shipyard worker, and a gold miner. (Tr. 32-33). He had a dairy farm in Port Wayne, Wisconsin, about twenty years ago, but he lost his farm after he sustained a leg and back injury. (Tr. 32-33).[5] Following a year or two of visits to the Mayo Clinic, he worked at the gold mine in Canada for an eight-month period, then moved to Kentucky (his childhood home) for a year or two, after which he returned to Florence County (Tipler). (Tr. 33). While he worked at Bay Ship Building Company, he did not change his residence, and his wife continued to live in Tipler, but during the week he stayed with his daughter at her apartment in Green Bay. (Tr. 37). In June, his daughter moved away from Green Bay. (Tr. 37; CX 5). Claimant testified

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[4] Claimant's wife testified that she contacted the Courtney Law Office around October 29, 1996. (Tr. 105, 108).

[5] Records from 1981 relating to this injury, which occurred in May 1978, appear at CX 1, Tabs A, B, and C. The injury involved impalement with a stick which went through the right thigh and groin region and out the right iliac spine area, causing residual thigh pain and low back pain. The findings were noted to be suggestive of L5 radiculopathy on the left side, but a myelogram and EMG were normal.

that in June 1996, he was laid off and he returned to his residence in Tipler. (Tr. 50).

Prior to his employment at Bay Ship Building, right after he moved to Green Bay, Claimant worked for Green Bay Dressed Beef, a job that involved the repeated lifting of 50-pound boxes and placing them by the conveyor belt. (Tr. 38, 63; CX 11). He only worked there for three or four weeks, when he heard a radio advertisement for Bay Ship Building, in Sturgeon Bay. (Tr. 38, 63-64). His daughter filled out the application for him, although he prepared the job history portion, and he gave his daughter's address in Green Bay as his address. (Tr. 71, 75). He went to Sturgeon Bay to work because it paid more. (Tr. 64). Initially, he was hired at Bay Ship Building as a mechanic assistant, although he also performed other jobs there, and he described the job as "Heavy work." (Tr. 38, 64-65). As a mechanic assistant, he was required to be able to lift 100 pounds, and his actual duties involved doing so on a more than occasional basis. (Tr. 39-40). His work included cutting out and replacing steel in damaged portions of boats, pulling planks out of the side tanks, and stacking them. (Tr. 40-41). He was able to perform this work without difficulty prior to the accident. (Tr. 41-42).

On the day of the accident (February 29, 1996), Claimant testified that he had pulled 96 seven-foot planks up out of the side fuel tank, and other workers in the hole were pushing them to him so he could pull them out and stack them. He was on the top of the tank bending over. At the end of the day, they were moving a scaffold, and when he tried to grab one end to keep it from falling on him, he "felt something tear" in his back. (Tr. 40-41, 66; ALJ 1; ***see also*** CX 1, Tabs D, F). He left the work site as it was quitting time and did not report the accident until the next morning. (Tr. 42). He was then sent to a doctor in Sturgeon Bay [Dr. Roenning], who examined him and sent him back to the shipyard. (Tr. 42). On March 6, 1996, he was restricted to sedentary work, no lifting, by Dr. Roenning, but the restrictions were later changed based upon Dr. Jones' and Dr. Robinson's recommendations, discussed below. (CX 1, Tabs D, E, F).[6] According to the Employer's first report of injury dated March 8, 1996, Claimant did not initially lose any time due to the accident. (CX 1, Tab D).

Medical Treatment

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[6] On March 6, 1996, the restriction was Sedentary (annotated "[n]o lifting"); on April 8, Light Medium (lift to 30#, carry to 20#); on April 12, Medium (lift to 50#, carry to 25#); on April 22, Light Medium (lift to 30#, carry to 20#); on May 1, Light (lift to 20#, carry to 10#); on May 21, Sedentary (lift to 10#, occ. carry less than 10#). (CX 1, Tab D.) Other restrictions are also indicated on the forms. The forms and incorporated definitions used by Drs. Roenning, Jones, Bressler, and Carlson for these categories are slightly different (and more complete) than those on Employer's forms, but the same weight restrictions apply. ***Compare*** CX 1, Tab D ***with*** CX 1, Tabs E, F, J and O. The corresponding limits are lifting to 75# and carrying to 40# for Light Heavy work and lifting to 100# and carrying to 50# for Heavy work.

Initially, at Sheryl [Langreder]'s suggestion, Claimant was treated by Dr. Jones in Green Bay (who prescribed Ultram), then he saw Dr. Bressler, who referred him to Dr. Robinson (who sent him to the hospital for epidural injections). (Tr. 42-43; CX 1, Tabs F, J, K). Claimant testified that his wife had called a doctor who had been treating him for chest pains, Dr. Hahn in Iron River, Michigan,[7] and Dr. Hahn had called Dr. Bressler. (Tr. 43, 65, 75-76).

Records from Dr. Roenning at Door County Medical Center for March 6, 1996 appear at CX 1, Tab E. Dr. Roenning noted that the Claimant had developed back pain with heavy lifting at work the preceding week which had worsened the day before. He was returned to work with sedentary restrictions, including no lifting, bending, twisting, or climbing.

Dr. Richard F. Jones' records appear as Tab F to CX 1. On March 12, 1996, Dr. Jones indicated that the Claimant could work at "Light Medium Work" (lifting up to 30 pounds, frequent lifting or carrying up to 20 pounds, but no climbing or reaching); on March 19, 1996, it was recommended that he return to work with no limitations; and on April 11, 1996, restrictions were imposed for "Medium Work" (lifting up to 50 pounds, frequent lifting or carrying up to 25 pounds, with no squatting or climbing). On the April 11 form, an MRI was noted to be negative for HNP [herniated nucleus pulposis].[8] An April 5, 1996 x-ray report (contained in Dr. Jones' records) revealed spondylosis at multiple levels without evidence of significant disk space narrowing. (CX 1, Tab F). Dr. Jones indicated on April 18, 1996 (the last time that he examined the Claimant) that Claimant had been working on light duty, but some climbing was required, and he had experienced an exacerbation of lumbosacral strain while driving on a bumpy road. At that time, Dr. Jones reduced the Claimant to "Light Medium Work" (lifting up to 30 pounds, frequent lifting or carrying up to 20 pounds, with no squatting or climbing).

Dr. Bruce C. Bressler's records, appearing at CX 1, Tab J, indicate that he saw the Claimant for a neurosurgical consultation on April 25, 1996. No surgical intervention was recommended. Dr. Bressler's impression was that the Claimant had myofascial pain and muscle spasm and he referred the Claimant to a physical medicine specialist in Green Bay [Dr. Robinson]. He placed the Claimant on a "Light Work" restriction (lifting 20 pounds maximum with frequent lifting or carrying up to 10 pounds).

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[7] Dr. Hahn's records, which appear at CX 1, Tab Q, indicate that in addition to treating the Claimant for chest discomfort in 1993, that same year Dr. Hahn diagnosed the Claimant with fibromyalgic syndrome and treated him with antidepressants.

[8] MRI examination reports dated April 9, 1996 and May 24, 1996 are of record, both of which revealed mild degenerative changes in the upper lumbar spine and no disc herniation or other abnormality; the latter report indicated no interval change. (CX 1, Tab H).

Dr. Brock L. Robinson's records appear at CX 1, Tab K. On April 26, 1996, Dr. Robinson reported that the Claimant had degenerative changes in the mid and lower lumbar spine (L5/S1) (revealed by an MRI) "which have had their tolerance exceeded through work-related exposure" complicated by shortened hamstrings. Physical therapy was recommended. Despite no initial improvement with physical therapy and the use of a corset, Dr. Robinson reported some success with epidural injections. On May 17, 1996, Dr. Robinson noted that the Claimant would be returning to work at the sedentary level; on May 24, he indicated he would continue with the same work restrictions; on June 3, he indicated that the Claimant "remain[ed] working at limited duty and seem[ed] to be tolerating his work fairly well," and that he advised him to stay with the same work restrictions but to resume active stretching; and on June 11, he reported that the Claimant estimated he was 80 to 85% improved as compared to before the epidural injections, and concluded "I think he can advance to light work." (CX 1, Tab K. ***See also*** CX 1, Tab G).

Claimant testified that Employer's expert, Dr. Schmidt, examined him on June 24, 1996. (Tr. 43). At that time, his only treatment consisted of painkillers (Ultram) and exercises. (Tr. 43). A June 24, 1996 neurological evaluation by Dr. Robert T. Schmidt appears at CX 1, Tab L and EX 3. Dr. Schmidt diagnosed lumbar strain with continued low back pain, left foot paresthesias and a Tinel's sign (consistent with mild trauma or mild neuroma), complaints of sexual dysfunction, and urinary hesitancy. He referred Claimant to a urologist for possible prostatic hypertrophy. Dr. Schmidt indicated that there were unlikely to be permanent residuals for the back complaints and that "normally [he] would be inclined to attempt to return the [Claimant] to normal duties through a work hardening program" but that he was "not able to make any specific recommendations in regard to his chronic back pain in the absence of a neurologic etiology."

According to Claimant, he was also authorized to visit Dr. Singh, the pain clinic doctor, who prescribed injections to kill the nerve, but the treatment was not undertaken. (Tr. 44, 65). Records dated August 14, 1996 from Dr. Vijay Singh appear at CX 1, Tab M. Dr. Singh diagnosed lumbar spondylosis, left SI (sacroiliac) syndrome, and left L5/S1 facet syndrome. He recommended diagnostic facet blocks, to be repeated if there was partial or complete relief. (CX 1, Tab M.)

In a final examination note of September 27, 1996, Dr. Robinson opined that the Claimant was at a "plateau of healing," assigned him a permanent partial disability of 3%,[9] and indicated that he had "documented pre-existing lumbar spondylosis" which was not disabling prior to his work-related injury. He noted that the Claimant had reported an "episode" of back pain "some years ago" after a logging accident but

[9] This percentage is essentially meaningless for cases brought under the Act.

indicated that it had completely resolved within a year or two.[10] Dr. Robinson opined based on the Claimant's description that "his tobacco growing work constitutes 'medium work' or perhaps 'medium-heavy' work" and noted that he was previously capable of heavier work. (CX 1, Tab K.)

According to Claimant, when Dr. Robinson examined him in September 1996, he recommended that he stop taking the Ultram because it was going to "bother [his] health," and Claimant did so. (Tr. 44, 77-78). He had trouble with the medication due to stomach ulcers, and the Ultram upset his stomach. (Tr. 45-46, 62). Dr. Robinson substituted Amitriptyline, which bothered his ulcers less, but he is no longer it taking because it failed "to take the edge off of the pain." (Tr. 46, 62, 78).[11]

Claimant testified that in October 1996, Dr. Blasier examined him for the Employer. (Tr. 47). An October 9, 1996 examination report from Dr. Ralph B. Blasier, an orthopedic surgeon, appears at CX 1, Tab N and at EX 1; Dr. Blasier's curriculum vitae appears at EX 2. Dr. Blasier diagnosed degenerative joint disease (multiple levels, lumbar spine, preexisting condition) and work-related aggravation of same. He later characterized the diagnosis as "lumbosacral strain" and indicated that the principal portion of the disability was due to the February 1996 lifting accident. He stated that the Claimant had "reached an end of healing in June 1996", that only a self-directed exercise program was recommended, and that he was capable of returning to work with restrictions ("lifting preclusion against more than 50 pounds occasionally or 25 pounds frequently.")[12]

Claimant contacted the rehabilitation clinic in Iron Mountain, at the suggestion of an attorney there, and he called Dr. Carlson, an occupational medicine physician.[13] (Tr. 46-47). Records from Dr. W.B. Carlson based upon his November 5, 1996 and subsequent examinations of the Claimant appear at CX 1, Tab O and at EX 7.[14] Dr. Carlson diagnosed chronic mechanical low back pain, agreed that a home exercise

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[10] As discussed above, records submitted by Claimant related to this accident show that it occurred in 1978 but he continued to be treated for left leg (calf and thigh) and back pain in 1981. (CX 1, Tabs A, B and C).

[11] Claimant testified that no one is treating his ulcers now. (Tr. 62).

[12] This would be deemed Medium work. See footnote 6, above.

[13] Employer has contested coverage of Dr. Carlson's fees based upon the assertion that he conducted an independent medical evaluation for the Claimant and there was no authorized change in physicians.

[14] As noted above, the records appearing at CX 1, Tab O2 (pp. 205 to 207) have been stricken.

program was the best option for therapy, and recommended that Claimant be confined to light duty, with maximum lifting of 20 pounds occasionally with frequent lifting and carrying of objects weighing up to 10 pounds with restrictions on driving, sitting or maintaining one position to no more than 30 minutes. In a report based upon a February 21, 1997 examination and a review of records, Dr. Carlson noted no objective findings except for pain on bending and leg raising and some "spasming" in the lower back; and his final assessment was that the Claimant had chronic mechanical low back pain which might benefit from injection therapy. On that same date, Dr. Carlson placed the Claimant on a "Light Work" restriction (lifting 20 pounds maximum with frequent lifting or carrying up to 10 pounds). Claimant apparently did not request approval of Dr. Carlson as his new physician until his attorney did so by letters of March 17, 1997 and May 14, 1997. (CX 12).

Attempts to Return to Work with Employer

A letter dated March 8, 1996 from Cheryl Langreder, Occupational Health Services for Employer, to Dr. Jones, indicates that following the accident, the Claimant was placed on modified duty, and that after being seen by a local family practice physician [Dr. Roenning] due to increased symptoms in the left leg on March 6, Claimant "was placed in hose repair, which is essentially bench type work." An attached job description for Mechanic Specialist (Steelworker 500/520, Boilermaker) states that to qualify the employee must "[b]e able to lift 100 pound on occasion and 50 pound frequently." [15] (CX 1, Tab D).

Claimant testified that he was laid off in June 1996, at which point he returned to his Tipler residence. (Tr. 50). Employment records show that he was laid off on June 21, 1996 (CX 9). When he was laid off at that time, Claimant verified that he was not doing the full duties of his normal job but was doing hose repair, which is light-duty bench work, and he could walk away from the bench any time that he wanted to. (Tr. 54).

Claimant further testified that in the fall of 1996, when he was finally terminated by Bay Ship Building, he had intended to go to work at Bay Ship Building, but he was unable to make the trip, even though he started down the road. (Tr. 49). It was at that time that he finally saw Dr. Carlson. (Tr. 49). He had been instructed to report on October 23, 1996, but that period was extended for one week based upon his contacts with Bay Ship Building. (Tr. 67-68; EX 10). Claimant testified that he called to say he had car trouble, and called three more times to say he was unable to make it in, but that the calls were actually made by his wife (Tr. 68-69). In November 1996, Claimant received his termination notice via a certified letter from Bay Ship Building, which

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[15] See footnote 6 above. The Mechanic Specialist position would be characterized as Heavy work based upon these lifting requirements.

stated that he had been terminated for failing to report for work for four days without reasonable cause. (Tr. 73-74). The termination letter, Employer's Exhibit 8, was dated November 6, 1996, and indicated that effective that date, employment with Employer was terminated for failure to report to work for four consecutive working days without reasonable cause. (EX 8, Tr. 158-62; CX 9).

Claimant's wife, Christine Ann Lewis, attempted to clarify the facts concerning Claimant's contacts with the Employer and attempts to return to work during the last week of October and first week of November of 1996. The gist of her testimony is that she had telephone conversations with various people at Employer's place of business in Sturgeon Bay, resulting in an extension of time for Claimant to report to work until October 31; that the radiator blew up when he was on his way to work during the early morning hours of October 31, after he had only gone five or six miles down the road; that he attempted to go to work on November 4 but had to stop due to severe back pain when he had gone 50 miles down the road; and that she left repeated voice mail messages explaining why Claimant could not report to work. However, despite her attempts at maintaining a contemporaneous log, it became clear on cross examination that she was somewhat uncertain as to the other dates and her account was unclear as to other specifics. (Tr. 84-105, 109-11). Claimant's Cellular One telephone bill (Claimant's Exhibit 15) reflects the calls made. (Tr. 105-07, 113-15; CX 15.) Claimant's wife also testified that Claimant saw Dr. Carlson on November 4 and that his appointment to see Dr. Carlson was made before his attempt to go to work. (Tr. 90, 112).

Sheryl Langreder, occupational health nurse for Employer, also attempted to clarify Claimant's contacts, through his wife, with the Employer. Her memory of the events was confined to notes which were prepared by someone else (Sandy Paul) but which recorded her contemporaneous recollection.[16] According to the notes, she told Claimant's wife that Claimant would need to report to First Aid so that he could sign a work restriction slip and his work restrictions could be accommodated. She verified that Claimant was given an extension of time to report to work until October 31, which was approved by John Schauske. (Tr. 119-24, 127).

Sandra Paul, the administrative assistant in human resources, testified that she prepared the notes marked as Employer's Exhibit 9 for "unemployment purposes." The woman identified as "Mary" was timekeeper Mary Michalowski. (Tr. 170-73). Employer's Exhibit 10 was the form mandatory recall letter, dated October 26, 1996. (Tr. 173-75).

John Schauske, the production manager for the Employer, indicated that he knew Claimant, who was a steelworker at the yard. Mr. Schauske explained that in

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[16] The document was later marked and admitted as Employer's Exhibit 9. (Tr. 163-64).

October 1996, Employer made it mandatory for steelworkers to either return to work or indicate "they're basically done." (Tr. 135-36). His understanding was that Claimant initially accepted the recall, by his wife's telephone call to Personnel on October 25, 1996. (Tr. 136, 161-62). He also indicated that Claimant was terminated for failure to report within five working days after a mandatory recall, measured from the time the employee contacts Employer in response to a certified letter (required to be within 24 hours of receiving that letter). (Tr. 149-50, 153-54). The five working days ended on the 31st, so Claimant would not have been in violation if he had shown up for work on the 31st. (Tr. 150). However, Mr. Schauske conceded that there were excuses that could have been accepted to justify his nonappearance, such as "My mother died, my house blew up." (Tr. 153-54). It was Mr. Schauske's opinion that the citation in the letter (and on Claimant's Personnel Control Card, CX 9) to another contractual provision relating to failure to report within four consecutive days was incorrect. (Tr. 149-50, 160-62, 166; EX 8). He testified that he had the discretion to allow additional days, and he opted to do so and was still waiting to see whether Claimant would appear on November 4. (Tr. 162-63, 166-67). He also testified that by the time the letter was sent, all the grace periods had expired. (Tr. 164).

Mr. Schauske conceded that for Claimant to be employed by Employer (unless special qualifications were involved), there would have to be a job that was within his physical abilities and was available to someone with his level of seniority. (Tr. 140-41). Claimant's seniority at Bay Ship Building was in the lower end of the scale of steel workers. (Tr. 53, 145-49, 156). It is easier to accommodate employees with fewer restrictions. (Tr. 157). Mr. Schauske testified that Employer could accommodate Claimant's restrictions, which he recalled was "25 pounds frequent, 50 occasional."[17] Such work has been available in most time periods from October 1996 until the time of the hearing (June 1998), but there are periods during which someone with Claimant's level of seniority would have been laid off. (Tr. 129-137, 143-47). During the same time period, there would be some work available with the restriction of occasional lifting of 20 pounds and frequent lifting of 10 pounds [Light duty] with permission to change positions for someone with Claimant's level of seniority. (Tr. 137-39). Mr. Schauske testified that if Claimant were to attempt to return to work and complain that his back condition was being aggravated, he would be allowed to go to occupational health and, if necessary, "sit or recline, apply ice, et cetera." (Tr. 139). On cross examination, he conceded that Claimant would be disqualified as a new hire (as a steelworker, mechanic specialist) because of his restrictions. (Tr. 141).

In a February 7, 1997 letter to Employer, Claimant (through counsel) inquired about the availability of light duty employment, but the letter apparently was not responded to. (CX 14; Tr. 141-43, 157-58, 167-69).

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[17] See footnote 6 above. These weight restrictions would constitute Medium duty work.

Employment Efforts and Labor Market

Claimant testified that he has been unable to find work in the Tipler or Iron Mountain area even though he has tried since June 1996. (Tr. 49, 51-52). Tipler is 300 miles from Duluth and 180 miles from Sturgeon Bay. (Tr. 50). He feels that he will be unable to obtain employment because the pain becomes unbearable, requiring that he lie down four or five times a day. (Tr. 52-53). The pain extends through his back and down his left leg and makes him fell as if he is walking on a nail in his left foot. (Tr. 53). His back has never returned to its pre-injury state. (Tr. 53). Claimant indicated his handwriting and spelling are not good. (Tr. 55). After June 1996, he visited the state unemployment office several times to look for work. (Tr. 56). In February or March 1997, he went to interview for a welding job with Lakeshore Welding in Iron River, but he was not hired. (Tr. 56-57). He applied for high-paying and low-paying jobs, and he made "cold calls." (Tr. 57). His experience is limited to construction and heavy equipment, although he has been a foreman on a few different jobs. (Tr. 60).

Claimant admitted on both direct and cross examination that before he got hurt, in 1995 or 1996, he had planned to move to Sturgeon Bay and to work the winters at Bay Shipbuilding. (Tr. 48, 66, 71). When he treated with Dr. Robinson, he was still living in Green Bay and commuting back and forth to his home, a distance of 130 miles. (Tr. 67).

Claimant testified that his activities are restricted and he cannot walk far. He will walk approximately 100 yards from the house to the greenhouse to look at the plants and grease the tractor, after which he lies down for a while. (Tr. 50).

Claimant's wife testified that she does most of the work on the tobacco plantation, along with her sons, and that Claimant supervises the work. (Tr. 82). Based on her own perception, the Claimant seems to be despondent and to be unable to do the work that he used to do. (Tr. 82, 83).

The labor market survey conducted by Dianne Briggs, Employer's vocational expert, appears at EX 5, her curriculum vitae appears at EX 6, and her June 29, 1998 deposition appears at EX 11. In a December 18, 1998 report, Ms. Briggs took issue with Mr. Ostwald's definitions and methodology. (EX 12). At her deposition, Ms. Briggs opined that there was a stable (albeit not large) labor market for Claimant in the northern counties and that there was a very stable labor market in Brown (Green Bay) and Door (Sturgeon Bay) counties at both the light and medium exertional level. (EX 11 at 22-26, 31-32, 34.) The wage range was from $5.50 per hour up to $18.00, with a more typical hourly wage of $7.00 to $8.00, in the Green Bay area. (EX 11 at 26-27). The wage range for light work in the northern counties would range from $5.50 to $10.00 hourly and the range for medium work would be for $10.00 to $14.00, with Claimant's likely rate of pay ranging from $6.00 to $8.00 hourly. (EX 11 at 32). In the

areas to the North, the jobs are more seasonal than those in urban areas such as Green Bay, Surgeon Bay, and Marinette. (EX 11 at 28).

A vocational report by David Ostwald dated May 13, 1998 and his curriculum vitae appear as CX 3, his July 31, 1998 deposition and June 30, 1998 vocational testing and assessment reports appear as CX 16, and his January 21, 1999 supplemental report appears as CX 18. In his initial report, Mr. Ostwald opined that, taking into account Claimant's current age, medical, educational, and work background, "it is reasonable to assume he would not be able to return to a job commensurate with his past earning capacity nor find employment within his current geographic location in which he resides." (CX 3). He reiterated these conclusions at his deposition and in his supplemental reports, and in his most recent report he also disputed Ms. Briggs' response to his deposition. (CX 16, 18).

Claimant's post-hearing deposition (CX 17) was conducted on July 31, 1998. Claimant outlined additional, unsuccessful efforts he made to obtain employment, including some of the jobs in the northern counties mentioned in Ms. Briggs' report. (A log summarizing efforts made from November 1996 to August 1997 appears as CX 7.)

DISCUSSION

Establishment of Compensable Injury

According to the Act, an injury is defined as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Here, the parties have stipulated that the Claimant sustained a low back injury on February 29, 1996 in the course and scope of his employment with Employer. However, it is disputed whether any disability arose from that injury.

Entitlement to Benefits Based Upon Disability

According to the Act, "'[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Total disability would thus be complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. To establish a ***prima facie*** case of total disability, a claimant must show that he or she cannot return to his or her regular or usual employment due to a work-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031 (5th Cir. 1981); ***Armfield v. Shell Offshore, Inc***., 25 BRBS 303, 305 (1992).

Inability to Perform Usual Employment

In order to make a determination of whether a claimant has made a ***prima facie*** showing of total disability, the administrative law judge must compare the claimant's medical restrictions with the requirements of his or her usual employment. ***Curit v. Bath Iron Works Corp.***, 22 BRBS 100 (1988); ***Mills v. Marine Repair Serv.***, 21 BRBS 115, ***on recon.***, 22 BRBS 335 (1988); ***Carroll v. Hanover Bridge Marine***, 17 BRBS 176 (1985); ***Bell v. Volpe/Head Constr. Co.***, 11 BRBS 377 (1979). Usual employment is defined as the claimant's regular duties at the time that he or she was injured. ***Ramirez v. Vessel Jeanne Lou, Inc.***, 14 BRBS 689 (1982). A claimant's credible complaints of pain alone may be enough to meet the claimant's ***prima facie*** burden. ***Anderson v. Todd Shipyards Corp.***, 22 BRBS 20 (1989); ***Richardson v. Safeway Stores***, 14 BRBS 855 (1982); ***Miranda v. Excavation Constr.***, 13 BRBS 882, 884 (1981); ***Golden v. Eller & Co.***, 8 BRBS 846 (1978), ***aff'd***, 620 F.2d 71 (5th Cir. 1980).

Here, although the Claimant's degree of impairment is in dispute, none of the physicians have expressed the opinion that the Claimant can return to his prior, Heavy duty job, which required occasional lifting of up to 100 pounds and frequent lifting and carrying of up to 50 pounds, and the preponderance of the evidence indicates that he is now unable to do so. Thus, Claimant has met his ***prima facie*** burden of establishing that he is unable to return to his usual employment.

Permanency/Maximum Medical Improvement

I find that Claimant reached maximum medical improvement (MMI) on September 27, 1996, based upon Dr. Robinson's opinion of that date that he had reached a "plateau of healing." Dr. Robinson did not address the issue of whether the Claimant may have reached MMI at some earlier date. However, his last examination report, of June 11, 1996 did not comment upon the issue of permanency, suggested that additional hamstring exercises were required, and indicated that he would reevaluate the situation in one to two weeks. I find that together, the June and September reports reflect Dr. Robinson's opinion that MMI was reached on September 27, 1996. I note that Dr. Blasier, who saw the Claimant a single time, also on September 27, 1996, opined that the Claimant reached "an end of healing" in June 1996. However, I find Dr. Robinson's opinion to be more persuasive because he was the Claimant's treating physician who had the benefit of seeing the Claimant over an period of time while Dr. Blasier only saw the Claimant once. Moreover, Dr. Blasier did not examine the Claimant on the earlier date which he found to represent the time of maximum medical improvement. Although Drs. Carlson and Singh indicated that future injections might be of benefit to the Claimant, their opinions were speculative as to the likelihood of future improvement. Neither addressed the issue of MMI. Payments prior to September 1996 should be characterized as temporary total disability benefits. ***See, e.g., Wilson v. Crowley Maritime,*** 30 BRBS 199, 1996 WL 705140 (1996) (affirming finding of TTD [temporary total disability] from date of accident until MMI, PTD

[permanent total disability] from date of MMI until date of actual employment, and PPD [permanent partial disability] from actual employment date and continuing); ***James v. Pate Stevedoring Co.,*** 22 BRBS 271, 274 (1989) (residual disability will be considered permanent when maximum medical improvement reached). Following the date of MMI, Claimant will be deemed to be permanently and totally disabled unless and until suitable alternate employment is established.

Suitable Alternative Employment

Since the Claimant has met his ***prima facie*** showing, the burden now shifts to Employer to show suitable alternative employment. ***Clophus v. Amoco Prod. Co.***, 21 BRBS 261 (1988); ***Nguyen v. Ebbtide Fabricators***, 19 BRBS 142 (1986). As a general rule, in order to show suitable alternative employment, Employer must show the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. ***Trans-State Dredging v. Benefits Review Bd. (Tarner)***, 731 F.2d 199 (4th Cir. 1984). ***See also Edwards v. Director, OWCP***, 99 F.2d 1374 (9th Cir. 1993); ***cert. denied***, 114 S.Ct. 1539 (1994). The employer is not required to act as an employment agency for the claimant. However, the employer must prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the claimant in the community. ***Bumble Bee Seafoods v. Director, OWCP***, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); ***Armfield v. Shell Offshore, Inc.***, 30 BRBS 122, 123 (1996); ***Salzano v. American Stevedores***, 2 BRBS 178 (1975), ***aff'd*** 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). ***But see New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981) (requiring demonstration of general availability of jobs). In order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available, the employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment. ***Piunti v. ITO Corporation of Baltimore***, 23 BRBS 367, 370 (1990); ***Thompson v. Lockheed Shipbuilding & Construction Company***, 21 BRBS 94, 97 (1988). If the employer cannot show suitable alternative employment, then Claimant is permanently and totally disabled. ***Manigault v. Stevens Shipping Co.***, 22 BRBS 332 (1989). If suitable alternative employment is shown, then the burden shifts back to Claimant to establish a diligent search and willingness to work. ***Williams v. Halter Marine Serv.***, 19 BRBS 248 (1987).

The employer must establish that suitable alternative employment is available within the claimant's local community. ***Turner***, 661 F. 2d at 1042. Local community has been interpreted to mean the community in which the claimant lived and worked. ***Jameson v. Marine Terminals***, 10 BRBS 194 (1979). "Employer meets its burden if it established suitable alternative employment in the area where the claimant was injured;

employer need not establish suitable alternative employment in a city where claimant relocates for personal reasons." ***Vasquez v. Continental Maritime of San Francisco, Inc.,*** 23 BRBS 428 (1990). In ***See v. Washington Metropolitan Area Transit Authority,*** 36 F.3d 375, 28 BRBS 96 [CRT] (4th. Cir. 1994), the U.S. Court of Appeals for the Fourth Circuit identified factors to be considered in determining whether the claimant's new residence is the appropriate labor market to be considered, and the ***See*** test was adopted by the Benefits Review Board in ***Wilson v. Crowley Maritime,*** 30 BRBS 199, 1996 WL 705140 (1996).

First of all, I find that the Claimant is only capable of performing Light duty work. In this regard, Dr. Carlson, who saw the Claimant in February 1997, determined that he should be restricted to maximum lifting of 20 pounds with lifting or carrying of up to 10 pounds frequently. This finding was consistent with the last assessment made by Dr. Robinson, on June 11, 1996. I do not agree with the Employer that when Dr. Robinson opined that Claimant was performing work on his tobacco farm that would be considered Medium or Medium Heavy work, that was tantamount to an opinion that Claimant could return to work in either of these categories on a full-time basis. While Dr. Blasier opined in October 1996 that the Claimant could do Medium duty work (***i.e,*** lifting 50 pounds occasionally and 25 pounds frequently), I find his opinion to be outweighed by those of Drs. Robinson and Carlson, who are treating physicians and have a better ability to assess the Claimant's condition over a period of time. In April 1996, Dr. Bressler placed Claimant's limitations at Light duty and that same month Dr. Jones placed him at Light Medium duty, but I find these opinions to be outweighed by the more recent medical opinions, that assessed Claimant's condition after he was given epidural injections on May 20 and 29,1996, after which, following some improvement, his condition stabilized.

Second, I find that the Employer never offered Light duty work to the Claimant, the record does not establish that Employer could realistically offer such work to someone of Claimant's seniority status, and the Employer's assertion that the Claimant's termination was valid and unrelated to the Claimant's injury is meritless. This case is analogous to ***Harrison v. Todd Pacific Shipyards Corp.,*** 21 BRBS 339, 1988 WL 232768 (1988), where the Benefits Review Board found that notwithstanding the claimant's termination for failure to return to work due to his arrest, the employer had failed to satisfy its burden of proving that suitable alternative employment was available. Similarly, in the instant case, Employer was vague about what opportunity was being offered to the Claimant, and based upon Mr. Schauske's testimony it appears that Medium duty work was being considered (25 pounds frequent, 50 occasional) instead of Light duty work.[18] Mr. Schauske indicated that Claimant would have been allowed to return to work on November 4, 1996. However, when Claimant set out on November 4, 1996, he found that he was unable to make the trip due to back

[18] See footnote 6 above.

pain after driving approximately 50 miles. Thus, Claimant's failure to report to work was at least in part due to his disability. Moreover, the Employer failed to assure him that he would be allowed to perform work consistent with his medical status, and Employer has failed to demonstrate that such work was available.

Third, while the issue is a close one, I find that the appropriate geographical area is the northern counties, based upon the analogous case of ***See, supra. See also Wood v. U.S. Department of Labor,*** 112 F.3d 592, 31 BRBS 43 [CRT] (1st. Cir. 1997); ***Wilson, supra***; ***Lewis v. Sipco Services and Marine, Inc.,*** BRB No. 96-0552 (May 23, 1997) (unpublished) (copy attached to Claimant's brief). The Fourth Circuit's decision in ***See*** required that certain factors be taken into consideration, including such factors as the Claimant's residence (currently, Tipler), his length of time in the "new" community (over ten years, aside from his temporary residence with his daughter in Green Bay), his ties to the community (which appear to be significant, as his wife is employed there), the availability of jobs in the community (limited as well as seasonal, and lower paying than in the area of injury), and undue prejudice to the Employer (considerable, given the limited and seasonal nature of the job opportunities and lower rate of pay in the Tipler area as compared with the more urban areas of Sturgeon Bay and Green Bay, combined with Claimant's temporary residence in Green Bay at the time of the injury because of those very factors). Applying these principles, only the availability of jobs and prejudice to the Employer would tend to go against the northern counties as the appropriate area. I recognize that this finding may not seem fair to the Employer, as Claimant was motivated to live with his daughter in Green Bay due in part to the higher rate of pay in the surrounding area and as the Claimant's average weekly wage was computed based upon his earnings with Employer in Sturgeon Bay. The Claimant was for all practical purposes a resident of Green Bay when he worked for Employer and his moving back to Tipler was motivated at least in part by his daughter's move at the same time that he was laid off. However, the Claimant has clearly been a long time resident of the community of Tipler and resides there now. While I accept Tipler as the pertinent local community, I reject Claimant's assertion that the area adjacent to Tipler should not be considered. In this regard, Claimant drove 50 miles before tuning back at the time of his attempted return to work in November 1996. Dr. Carlson noted in his February 1997 report that the Claimant could drive 30 miles and the record does not reflect that any doctor has currently placed further restrictions on his driving ability. Ms. Briggs utilized a commuting distance of 30 to 40 miles, which I find to be appropriate. (Ex 11 at 80).

Fourth, I find that Employer has established that Light duty employment was available in the northern counties that the Claimant could realistically compete for and perform based upon the vocational evidence. In this regard, the Claimant has since the time of the accident performed Light duty work for the Employer without difficulty, and I find that he could continue to perform such work. I further find the deposition testimony and reports of Ms. Briggs to be better documented and reasoned than those of Mr.

Ostwald. (CX 3, 16, 18; EX 5, 11, 12). I am persuaded by Ms. Briggs' opinion, supported by factual data, that Light duty jobs for which the Claimant is qualified are available in the northern counties and that at least some of these jobs provide a "sit/stand" option. At her deposition, Ms. Briggs testified that it was her opinion that there was a stable employment market and suitable employment available for the Claimant in the northern counties both at the Light duty and the Medium duty levels, that he would secure employment there, and that at light duty he could expect to earn between $6.00 and $8.00 per hour. (EX 11 at pages 31-32, 34-35, 60-61).[19] Examples of available Light duty work not requiring specific experience include work as a bartender in Wabeno for an hourly wage of $5.50 to $6.00 per hour, as a Machine Operator/Inspector in Wausaukee for $6.15 per hour, and as a Slot Attendant in Harris for $7.37 per hour. (EX 11, Deposition Exhibit 1). Mr. Ostwald's opinion that the Claimant would be unlikely to find any employment whatsoever within his current geographic location, based upon his current age, medical, educational, and work background, is not persuasive. (CX 16). Mr. Ostwald has certainly identified factors, such as the Claimant's age, that would make it more difficult for the Claimant to secure employment, (CX 16 at 32, 34-39, 40-42, 44, 61-63; CX 18). However, I find Ms. Briggs' opinion that Claimant would be likely to find suitable employment if he were to conduct a diligent search to be more persuasive.[20] In this regard, Ms. Briggs noted in her supplemental report that the 1998 unemployment rate was low (only 2.7%) for Wisconsin overall, that the unemployment rate in the northeastern counties was 2.6% as compared with 2.8% for the northern counties, and that the labor shortage in the northern areas has been characterized as "a year round phenomenon." (EX 12). Claimant's location in the northern counties clearly would require a more extensive search than would be required in the urban areas of northeastern Wisconsin, but that does not indicate that employment is unavailable in the northern counties. However, due to the limited number of available light duty opportunities, I find that the lower end of the range suggested by Ms. Briggs ($6.00 hourly) should be considered as the Claimant's wage earning capacity.

Considering the above, I find that Employer has demonstrated realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried, and that his current wage earning capacity is $6.00 hourly.

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[19] According to Ms. Briggs, Claimant would be likely to earn $7.00 to $8.00 per hour, "perhaps more", in the northeastern area (Green Bay/Sturgeon Bay area) of Wisconsin. (EX 11 at 20-21, 28, 37-42).

[20] At her deposition, Ms. Briggs testified that there were job opportunities in northern Wisconsin, although they were not as plentiful as in northeastern Wisconsin, and she stated: "I think you just have to work a little harder to become employed. . . ." (EX 11 at 72, 80).

Lack of Diligence in Search for Employment

As Employer has established the availability of suitable alternate employment, the burden therefore shifts to the Claimant to establish a diligent search and willingness to work. In addressing this issue, I must make specific findings regarding the nature and sufficiency of Claimant's efforts. ***See Palombo v. Director, OWCP,*** 937 F.2d 70, 25 BRBS 1 [CRT] (2d Cir. 1991).

I find that Claimant has failed to establish a diligent search and willingness to work based upon his search for employment in late 1996 and early 1997 (summarized in CX 7), combined with the search he conducted following the June 10, 1998 hearing (as outlined in his July 31, 1998 deposition [CX 17]). In this regard, I agree with Ms. Briggs and disagree with Mr. Ostwald as to the adequacy of Claimant's search. (***Compare*** CX 16 at 58, 66, 69-70 ***with*** EX 11 at 28-30; EX 12).

The log memorializing the search Claimant made from November 1996 to August 1997 certainly indicates that some effort was made to seek employment. (CX 7). However, Claimant has not established that he made a serious effort to obtain these jobs. The data concerning the specifics of this job search is too vague for me to place much reliance upon it. [21] Claimant's testimony concerning this job search, at the hearing, also lacked details, and it is not clear who made the calls or what was said to the employers. There is also no indication whether the selection of employers was based upon any rational methodology. (Tr. 56-58). In contrast, Claimant did testify by deposition with some specificity concerning the job search he made during a two-week period in July 1998. (CX 17). However, Claimant's July 1998 search appears to have been more for the purpose of litigation than for the purpose of obtaining employment, and it appears that Claimant may have actually tried to discourage certain employers.

First, Claimant contacted the jobs identified by Ms. Briggs in early June 1998, but apparently did not do so until July 13, at which point at least some of the jobs had been filled. (***See*** CX16, Deposition Exhibit 3 [Employer Contact Logs]). That a Claimant may take specific jobs from an Employer's job survey and show that he was unable to obtain such jobs, as he did here, is not tantamount to a diligent search and does not constitute a showing that employment is unavailable. A job survey is intended to show examples of jobs for which a Claimant may realistically compete, not provide a list of all available employment. Even with respect to the list of light duty jobs available in the northern counties, Claimant summarily rejected the job of "bartender" because he does not drink, which is obviously not a job requirement, and because he does not "get along with drunks." (CX 17 at 5). To decide that one does not want to be considered for certain jobs based upon one's personal attitudes is not the same as saying job

[21] The 1996/1997 search relates to the period before which I have found that the Employer has established suitable alternative employment.

opportunities commensurate with one's age, education, work experience, and physical restrictions are unavailable. Given the limited nature of the job market in the northern counties at any duty level (which was the very reason that Claimant worked in Green Bay and Sturgeon Bay prior to his injury), such an arbitrary rejection of an employment opportunity would suggest a failure to pursue a diligent search.

Second, in addition to addressing the sample job opportunities listed by Ms. Briggs, Claimant asserts that following the hearing he stopped by every place he could think of without success. Like the applications for the jobs identified by Ms. Briggs, these contacts were also made during the two week period from July 13 through July 29, according to the logs prepared by Claimant's wife. (CX 17, p. 7-9; CX16, Deposition Exhibit 3 [Employer Contact Logs]). In filling out applications, when asked whether he had a disability that would limit his performance of the work, Claimant indicated that he had a lower back injury that would so limit his job performance, without explaining that it could be accommodated. Had Claimant really wanted to obtain that particular job, he would not have indicated that he had a disability without explaining that he could nevertheless perform the job in an adequate manner. In any event, a two-week period is an insufficient time for a worker in any location to test a job market and decide that there are no jobs available. I disagree with Mr. Ostwald that Claimant's two-week search combined with his earlier efforts was sufficient (CX16 at 58) and I agree with Ms. Briggs that it was not. (EX 12). Also, as discussed above, the 2.8% unemployment rate for the northern counties noted by Ms. Briggs, together with the observation that the "now-chronic labor shortage that has been so much a part of the job scene these last few years is really a year round phenomenon now" (based upon a November 1998 employment review), suggests that Claimant would indeed obtain employment at the Light duty level if he were to really make an effort. Here, the Claimant has failed to show that he has conducted a diligent search, and Claimant has not shown a willingness to work at other than his tobacco farm.

Temporary Total, Permanent Total, and Permanent Partial Disability Benefits

Total disability benefits (both temporary and permanent)[22] are payable in the amount of 2/3 (“66 2/3 per centum”) of a claimant’s average weekly wage during the continuance of the disability. 33 U.S.C. § 908(a), (b). Total disability becomes partial on the earliest date that the employer establishes the availability of suitable alternate employment (not the date of maximum medical improvement.) ***Rinaldi v. General Dynamics Corp.,*** 25 BRBS 128, 131 (1991). The claimant is entitled to total disability benefits from the onset of such disability until permanent partial disability benefits, if any, are payable. An award for permanent partial disability (for a non-scheduled disability) is based on the difference between the pre-injury average weekly wage and

[22] As noted above, disability is deemed to be temporary until maximum medical improvement (MMI) is achieved, at which point disability is permanent.

the post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). Benefits are paid at a rate of 2/3 of the loss of wage earning capacity. ***Id.***

I have found that Claimant suffered a compensable injury on February 29, 1996. I have further found that as a result of this injury, Claimant is permanently and totally disabled, the Employer has established the existence of suitable alternative employment in the area of Claimant's home with hourly wages of $6.00 as of the date of Ms. Briggs' survey (June 8, 1998 [EX 5]), the Claimant's current wage earning capacity is $6.00 hourly, and the Claimant has not shown a diligent search for employment. Accordingly, I find that the Claimant is entitled to temporary total disability benefits from the time he was laid off (June 21, 1996 [CX 9]) until he reached MMI (September 27,1996); permanent total disability benefits from September 27, 1996 until the date of Ms. Briggs' survey (June 8, 1998); and permanent partial disability benefits thereafter.

Temporary and Permanent Total Disability

Claimant is entitled to compensation based upon two thirds of his pre-injury average weekly wage of $426.80 per week (or $284.53) from the time that he terminated his employment with the employer in June 1996 until the date of Ms. Briggs' survey of June 8, 1998. As noted above, the benefits are payable as temporary total disability (TTD) until the time of maximum medical improvement (MMI) and as permanent total disability (PTD) after the date of MMI.

Permanent Partial Disability

Claimant's loss of wage earning capacity is calculated by taking the difference between his current wage earning capacity ($6.00 hourly, or $240.00 per 40 hour week) and his pre-injury average weekly wage ($426.80 per week, or $10.67 hourly), for an hourly loss of wage earning capacity of $4.67 per hour or $186.80 per week. Permanent partial disability benefits are payable based upon two thirds of this rate (or $124.53 per week).

Medical Fees of Dr. Carlson

Section 907(a) of the Act generally requires that an employer furnish medical, surgical, and other treatment for such period as the injury may require. The regulations provide that a claimant is not authorized to change physicians without the prior consent of the employer or the district director, and that the district director may order a change in physicians when necessary or desirable. 20 C.F.R. § 702.406. Under section 7(d) of the Act, a claimant may be reimbursed for medical expenses already paid if certain criteria are satisfied. 33 U.S.C. § 907(a)(d); ***see also*** 20 C.F.R. § 702.401 ***et seq.*** Although medical services must generally be authorized by an employer to be compensable, a claimant is released from the obligation of seeking an employer's

authorization once the employer has refused to provide treatment or to satisfy the claimant's request for treatment. ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988) (***per curiam***). A claimant may obtain reimbursement if a request was made for treatment, the employer refused the request, and the treatment procured thereafter was reasonable and necessary; these factual issues are to be resolved by an administrative law judge. ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112, 113, 1996 WL 582378 (1996); ***Anderson v. Todd Shipyards Corp.,*** 22 BRBS 20, 1989 WL 245280 (1989). An unreasonable delay in acting on such a request (***e.g.***, one month) may be deemed a constructive denial. ***Parklands, Inc. v. Director, OWCP,*** 877 F.2d 1030, 1035-36, 22 BRBS 57 [CRT] (D.C. Cir. 1989); ***Schoen, supra***.

Employer argues that the fees of Dr. Carlson should not be covered because there was an unauthorized change of physicians. I agree with respect to the initial visits with Dr. Carlson, which I find to be not reimbursable.[23] For these visits, no prior request for treatment was made. However, I find that Claimant made such a request by counsel's letter of March 17, 1997, to which no reply was received, as evidenced by Claimant's counsel's letter of May 14, 1997. (CX 12). I find that the Claimant did not seek a change in physicians prior to March 17, 1997 and his treatment prior to that date was unauthorized, Employer's failure to respond to the March 17, 1997 letter may be deemed a constructive denial, the Employer's refusal to respond or to accept Dr. Carlson as the Claimant's new treating physician was unreasonable, the medical treatment provided by Dr. Carlson was reasonable and necessary, and the fees incurred after March 17, 1997 are reimbursable.

Section 8(f) Relief

As noted above, the Employer submitted an "Amended Application for Limitation of Liability under Section 8(f) of the Longshore and Harbor Workers' Compensation Act" under cover letter of April 30, 1999. To qualify for Section 8(f) relief, an employer must show the following: (1) the employee had a preexisting permanent partial disability; (2) this preexisting disability was manifest to the employer prior to the subsequent injury; and (3) the second injury alone would not have caused the claimant's current level of disability. ***See Director, OWCP v. Luccitelli***, 964 F.2d 1303, 1305 (2d Cir. 1992).

With respect to the first element, in order for an employer to establish a preexisting partial disability, it must show that a claimant had a physical disability that would motivate a cautious employer to discriminate against the handicapped employee for fear of increased liability for compensation. ***Director, OWCP v. General Dynamics Corp.***, 982 F.2d 790, 796 (2d Cir. 1992) (***citing C & P Tel. Co. V. Director, OWCP***,

[23] I am not resolving the issue of whether any of these fees may be recoverable as litigation costs.

564 F.2d 503, 513 (D.C. Cir. 1977)). While lifestyles, habits, and the aging process are not, in and of themselves, preexisting disabilities, any physical impairments, diseases, or conditions which are the **result** of lifestyles, habits, or the aging process may constitute preexisting disabilities. For example, degenerative disc disease may be a preexisting disability. ***Greene v. J.O. Hartman Meats***, 21 BRBS 214, 216-18 (1988).

The second element -- that Employer must show that the preexisting disability was manifest -- is not a statutory requirement, but has been regularly imposed "by all federal circuit courts which have addressed the issue." ***Stone v. Newport News Shipbuilding & Dry Dock Co.***, 20 BRBS 1, 5 n.2 (1987). According to the Fourth Circuit:

> The manifestation requirement places on the employer the burden of showing that at the time of hiring or during the period of employment the employee suffered from some existing medical disability or handicap that predated any occupational injury and contributed to or aggravated the occupational injury. It is not required that the employer have actual knowledge of the preexisting condition, only that the knowledge of the preexisting condition be available to the employer when the period of employment begins or at some point during the period of employment, for example from existing medical records. ***See Lambert's Point Docks, Inc. v. Harris***, 718 F.2d 644 (4th Cir.1983).

Newport News Shipbuilding and Dry Dock Co. v. Harris, 934 F.2d 548, 553 n. 3 (4th Cir. 1991).

Finally, under the third element, Employer must prove that one or more of the preexisting permanent partial disabilities contributed to Claimant's disability in order to show eligibility for section 8(f) relief. ***Two "R" Drilling Co. v. Director, OWCP***, 894 F.2d 748, 750 (5th Cir. 1990). In the ***Two "R" Drilling Co.*** case, the Court held that the employer had not met its burden of proving entitlement to relief because it had not put on medical evidence to suggest that claimant's preexisting back diseases contributed to his current total back disability. ***Id.*** In ***Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.,*** 138 F.3d 134, 138-39 (4th Cir. 1998), which addressed a case of permanent partial disability, the Fourth Circuit explained that the employer must show that the ultimate permanent partial disability, materially and substantially exceeded the disability that would have resulted from the work related injury alone. ***See also Sealand Terminals, Inc. v. Gasparic,*** 7 F.3d 321 (2d Cir. 1993); ***FMC Corp. v. Director, OWCP,*** 886 F.2d 1185 (9th Cir. 1989).

Because the Director has not responded to Employer's petition, the issue that I will address is whether the Employer has made a ***prima facie*** showing of entitlement to section 8(f) relief. For the reasons set forth below, I find that it has failed to do so.

There is thus no need for a response on behalf of the Director, and the petition will be denied.

With respect to the first element, there is evidence that the Claimant had a preexisting lower back injury and preexisting lumbar spondylosis, as well as a prior ulcer. However, it is not entirely clear that these disabilities would satisfy the first element, based upon a showing that they were disabling or would motivate an employer to be reluctant to hire the Claimant. In this regard, the back injury occurred over ten years before, it had resolved according to Claimant's treating physician (Dr. Robinson), and there is no indication that there were any residuals. There is no indication that the ulcers were of any significance before the Claimant started taking medication for his back. However, Dr. Blasier determined that Claimant "probably" had some preexisting back disability, and it is beyond cavil that the existence of a preexisting back disability would make an employer reluctant to hire an employee to perform Heavy duty work involving heavy lifting. There has been no similar showing with respect to the ulcer. I therefore find that Employer has established the first element for the back disability, but not for the ulcer.

Turning to the second element, Employer correctly points out that it is not necessary that it be actually aware of the preexisting disability. It is enough that records were in existence at the time the Claimant was hired or during the course of his employment, prior to the injury, which showed the preexisting condition. The 1981 records from the Mayo Clinic evidencing the Claimant's prior lower back and leg disability satisfy the manifestation requirement with respect to that disability but do not satisfy the manifestation requirement with respect to the ulcer.

With respect to the third element, the Employer has failed to show that he is more disabled than he would otherwise be due to his preexisting conditions. Employer's evidence on the third element is confined to Dr. Blasier's reports and deposition. With respect to the issue of whether the preexisting back disability contributed to the Claimant's current disability, Dr. Blasier provided the following response, when asked whether the Claimant's ongoing complaints are causally related to the February 29, 1996 work injury:

> Response: The claimant had preexisting pathology and probably some preexisting disability. However, the principle (***sic***) portion of his disability is due to the lifting accident of February 29, 1996.

(EX 1). On the issue of whether the ulcer in any way contributed to the Claimant's current disability, Dr. Blasier stated at his deposition and in his supplemental report that the ulcer affects Claimant's ability to tolerate medications and renders him incapable of driving long distances or driving any distance without pain when on such medication. (Petition, Exhibits A and B). This evidence is too equivocal to satisfy Employer's

burden of showing that his current permanent partial disability is materially greater than it would have been had he not sustained the earlier disabilities. I have found Claimant is capable of performing Light duty employment, and there is no indication that he would be capable of heavier work had it not been for his preexisting back condition and ulcer.

Employer has therefore failed to establish a ***prima facie*** basis for entitlement to section 8(f) relief and his petition must be denied.

Attorneys Fees

As the Claimant has substantially prevailed on the disputed issues, reasonable and necessary attorneys' fees will be awarded. 33 U.S.C. § 928; 20 C.F.R. §§ 702.131 - 702.135. Costs may also be awarded, including witness fees and expenses for transcripts. 33 U.S.C. § 928(d); ***Swain v. Bath Iron Works Corp.,*** 14 BRBS 657 (1982). Claimant's current attorney and the Courtney Law Firm shall have thirty (30) days after receipt of this Decision and Order to submit a fee petition and bill of costs and the Employer's attorney shall have thirty (30) days to file any objections. The issue of attorneys fees and costs will be addressed in a supplemental decision and order.

ORDER

IT IS HEREBY ORDERED that the Claimant's claim for temporary/permanent total disability and permanent partial disability benefits are **GRANTED** to the extent set forth above; and Claimant's claims for disability compensation are otherwise **DENIED** and the Claimant's claim for reimbursement for Dr. Carlson's medical expenses after March 17, 1997 is **GRANTED,** as set forth above, and his claim for reimbursement for Dr. Carlson's medical expenses are otherwise **DENIED**; and

IT IS FURTHER ORDERED that Employer/Carrier's petition for section 8(f) relief is **DENIED**; and

IT IS FURTHER ORDERED that Claimant's attorneys shall file a fully supported and itemized petition for attorney fees and costs within thirty (30) days of receipt of this Decision and Order, and the employer shall file any objections within thirty (30) days of service of Claimant's petition.

PAMELA LAKES WOOD
Administrative Law Judge

Date: September 13, 1999